

## THE TERRI SCHIAVO CASE: IN DEFENSE OF THE SPECIAL LAW ENACTED BY CONGRESS AND PRESIDENT BUSH

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### I. INTRODUCTION

Terri Schiavo's case transfixed the nation for the last few weeks of March 2005 as the brain-damaged woman lay dying in a Florida hospice. Mrs. Schiavo had been in a vegetative state for years, and her husband Michael Schiavo successfully petitioned the Florida state courts for an order directing the withdrawal of her feeding and hydration tube. Mrs. Schiavo's husband, and legal guardian, claimed before the Florida state courts that his wife had previously expressed to him a wish not to be kept alive by artificial means if she became incapacitated. The Florida state courts found that there was clear and convincing evidence that Mrs. Schiavo would have wanted her feeding and hydration discontinued, as her husband claimed.<sup>1</sup> Mrs. Schiavo's parents, devout Catholics, challenged this claim repeatedly: before the Florida state courts, before Circuit Justice Anthony M. Kennedy, before the Florida state legislature, and finally before the Congress of the United States. Finally, both the Florida state legislature and the Congress passed special laws for Mrs. Schiavo's relief. The Florida state legislature, with the support of Governor Jeb Bush, passed "An act relating to the au-

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<sup>1</sup> *Schindler v. Schiavo (In re Schiavo)*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) (affirming the trial court's decision to withdraw feeding and hydration from Mrs. Schiavo). The opinion of trial judge Greer in the Circuit Court of Pinellas County, Florida is unpublished, but its findings regarding the clear and convincing evidence of Mrs. Schiavo's wishes were summarized in Florida District Court of Appeals Judge Altenbernd's third appellate opinion regarding this case, *Schindler v. Schiavo (In re Schiavo)*, 800 So. 2d 640 (Fla. Dist. Ct. App. 2001) as follows:

(1) Mrs. Schiavo's medical condition was the type of end-stage condition that permits the withdrawal of life-prolonging procedures, (2) she did not have a reasonable medical probability of recovering capacity so that she could make her own decision to maintain or withdraw life-prolonging procedures, (3) the trial court had the authority to make such a decision when a conflict within the family prevented a qualified person from effectively exercising the responsibilities of a proxy, and (4) clear and convincing evidence at the time of trial supported a determination that Mrs. Schiavo would have chosen in February 2000 to withdraw the life-prolonging procedures.

*Id.* at 642 (citations to Florida statutes omitted).

thority for the Governor to issue a one-time stay,”<sup>2</sup> which gave the governor the authority to issue a stay that prevented the withholding of Mrs. Schiavo’s food and hydration. The law that Congress passed was designed to encourage the federal courts to rehear de novo Mrs. Schiavo’s federal question claims.<sup>3</sup> With “Terri’s Law,” Congress gave the federal courts jurisdiction to hear any claim “for the alleged violation of any right of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.”<sup>4</sup> These laws notwithstanding, the federal district court and the Eleventh Circuit both declined to rehear the case on its merits.<sup>5</sup>

In the wake of the refusal of the federal courts to act, Mrs. Schiavo died of starvation and dehydration. In response, then-House-Majority-Leader Tom DeLay angrily attacked the federal courts for their failure to act

<sup>2</sup> The text of the law is brief and unambiguous:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

- (a) That patient has no written advance directive;
  - (b) The court has found that patient to be in a persistent vegetative state;
  - (c) That patient has had nutrition and hydration withheld; and
  - (d) A member of that patient’s family has challenged the withholding of nutrition and hydration.
- (2) The Governor’s authority to issue the stay expires 15 days after the effective date of this act, and the expiration of the authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.
- (3) Upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

2003 Fla. Laws ch. 2003-418, *declared unconstitutional* by *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004).

<sup>3</sup> Act for the Relief of the Parents of Theresa Marie Schiavo (“Terri’s Law”), Pub. L. No. 109-3, 119 Stat. 15 (2005), provides that the United States District Court for the Middle District of Florida has jurisdiction to review de novo whether “any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life” had been violated, *id.* § 1, “notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings,” *id.* § 2. Further it directs the District Court to “entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.” *Id.* Subsequent sections specify the scope of the law’s application to Mrs. Schiavo, the titles of which speak for themselves (“SEC. 5. NO CHANGE OF SUBSTANTIVE RIGHTS”; “SEC. 6. NO EFFECT ON ASSISTING SUICIDE”; “SEC. 7. NO PRECEDENT FOR FUTURE LEGISLATION”; “SEC. 8. NO EFFECT ON THE PATIENT SELF-DETERMINATION ACT OF 1990”). *Id.* §§ 5–8.

<sup>4</sup> *Id.* § 1.

<sup>5</sup> See *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla.), *aff’d*, 403 F.3d 1289 (11th Cir.) (denying injunction), *reh’g en banc denied*, 404 F.3d 1270 (11th Cir.), *reh’g denied*, 404 F.3d 1282 (11th Cir.), *stay denied*, 125 S. Ct. 1722 (2005).

and suggested that the House consider impeaching some of the judges involved. He ultimately abandoned that effort, but anger over Mrs. Schiavo's treatment continued in the weeks following her death. In retrospect, the Schiavo controversy appears to have been a major battle in the continuing culture wars over whether the United States is or is not committed to what has been termed a "culture of life."

This Essay examines the moral and legal issues raised by the Terri Schiavo case. I begin in Part II below by briefly stating the moral case in defense of the position that Mrs. Schiavo's parents took opposing the withdrawal of her feeding and hydration tube. I discuss the equities of the case and briefly explain why state and federal courts of equity ought to have ruled for Mrs. Schiavo's parents, and against her husband, based on the evidence that was available when those courts ruled. I then ask in Part III whether the extraordinary law that Congress passed and President George W. Bush signed, directing the federal courts to redecide the federal questions raised by Mrs. Schiavo's case, was constitutional. While there are a number of very close and hard constitutional questions raised by the law, I conclude that the special bill for Mrs. Schiavo's and her parents' relief was constitutional. Finally, in Part IV, I consider whether as a policy matter it was appropriate for Congress and the President to intervene in the Schiavo case in the way they did.

## II. THE MORAL AND EQUITABLE CASE AGAINST WITHDRAWING MRS. SCHIAVO'S FEEDING AND HYDRATION TUBE

Consideration of the Schiavo case must begin by discussing the moral issues that the case raises. As former Senator and Vice President Hubert Humphrey once observed, "The moral test of a government is how that government treats those who are in the dawn of life—the children; the twilight of life—the elderly; and the shadows of life—the sick, the needy, and the handicapped."<sup>6</sup> Recently, American society has not had a very good record on these "culture of life" issues. We live in a country where late-term abortions are more readily available than in most other Western democracies<sup>7</sup> and where experimentation with assisted suicide was recently endorsed by the Second and Ninth Circuits<sup>8</sup> and is legal in the state of Oregon.<sup>9</sup> While America is not yet as cavalier in its attitudes about the

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<sup>6</sup> Fred Barnes, *Life of the Party*, WKLY. STANDARD, Apr. 11, 2005, at 7.

<sup>7</sup> MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 22–24 (1987); *see also* Roper v. Simmons, 125 S. Ct. 1183, 1227 (2005) (Scalia, J., dissenting).

<sup>8</sup> *See* Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997); *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997). Despite the Supreme Court's reversals of the 1996 circuit court decisions, the endorsement continues, at least in the Ninth Circuit. *See Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), *cert. granted sub nom. Gonzales v. Oregon*, 125 S. Ct. 1299 (2005).

<sup>9</sup> The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2003), allows physicians to prescribe to terminally ill residents of Oregon lethal doses of controlled substances, subject to certain

sanctity of life as was the late Roman Empire,<sup>10</sup> there has been a noticeable coarsening in our attitudes about life in the thirty-seven years since I first began following public issues. The Schiavo case, then, represents poignant recent evidence of American moral decline.

Terri Schiavo was alive but incapacitated this winter before courts ordered that she be starved to death. She had been in a persistent vegetative state for a number of years due to brain injuries she suffered as a result of a stroke and subsequent fall in her house. Her parents, however, thought she was responsive, that she communicated with them, and that she did not need any extraordinary medical care to stay alive. Under these circumstances, I believe it was immoral for the courts to order the discontinuation of her feeding and hydration for three reasons.

First, state or federal courts did not order PET<sup>11</sup> or brain scanning to be done on Mrs. Schiavo before her feeding and hydration tube was disconnected. Thus, there was no hard evidence that Mrs. Schiavo was truly brain-dead at the time that tube was removed. A subsequent autopsy suggested that Mrs. Schiavo had been brain-dead when feeding and hydration was discontinued,<sup>12</sup> but this was not a known fact when the tube was dis-

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procedures intended to protect those not “capable” of making an “informed decision” to request such a prescription.

<sup>10</sup> In a formerly glorious culture rapidly deteriorating under the strain of civil war and the threat of barbaric invasion (sound familiar?), the public spectacle of gladiatorial blood sport, whose proliferation began in the late second century B.C., “reached a peak in the third century A.D. when numerous prisoners of war were available for combat.” HENRY C. BOREN, *ROMAN SOCIETY* 207 (1977). Another popular entertainment was watching convicts spend their last earthly moments being rent limb from limb by “starving and fierce wild animals.” *Id.* at 208. The irreverence towards human life was also well embodied by the state-sponsored persecutions of Christians from Nero’s time down to Decius’s “empire-wide” sweeps in the 3rd Century A.D. aimed at “wiping out Christianity root and branch,” *id.* at 297, and by the predominant strategy of killing oneself prior to probable torture and execution or assassination, exemplified by the suicides of those suspected of treason under Nero, and then by Nero himself, *id.* at 179–81.

<sup>11</sup> A Positron Emission Tomography, or “PET,” scan detects the movement of positrons in a radioactive substance injected into a patient as the substance moves through the physiological network of the internal organs. Biomedical Research Foundation of Northwest Louisiana, Positron Emission Tomography Imaging Center Overview, <http://www.biomed.org/pet.html> (last visited Sept. 8, 2005). By viewing the moving image created, a doctor can observe “the chemical functioning of organs and tissues, while other imaging techniques—such as X-ray, CT (Computer Tomography or Computer Axial Tomography, or CAT scan) and MRI—show [only] structure.” *Id.* In his January 24, 2001 opinion, Judge Altenbernd of the Second District Court of Appeal in Florida noted that “[b]y mid-1996, the CAT scans of [Terri’s] brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid.” *Schindler v. Schiavo (In re Schiavo)*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001). However, unlike the PET scan, the CAT scan shows only the structure of a patient’s internal anatomy, not a measurable indication of the brain’s activity, and the court indicated it was possible that questions regarding Terri’s actual condition might not be resolved without a test that could provide such an indication. *Schindler v. Schiavo (In re Schiavo)*, 800 So. 2d 640, 646 (Fla. Dist. Ct. App. 2001).

<sup>12</sup> Abby Goodnough, *Schiavo Autopsy Says Brain, Withered, Was Untreatable*, N.Y. TIMES, June 16, 2005, at A1.

connected. At a bare minimum, it ought to be presumed, until it can be scientifically shown otherwise, that a person—a person who was indisputably alive before a medical incident like the one Terri Schiavo experienced—has brain-functioning. I am not a scientist or a physician, but based on my limited understanding of the science in this area, a PET scan is needed to conclusively establish that an individual has lost consciousness permanently or has suffered the loss of higher brain functions. It seems cavalier and coarse to presume that Mrs. Schiavo was brain-dead without performing this basic and easily available medical procedure. Mrs. Schiavo was not terminally ill, and she was not in pain. She was in a vegetative state. Her parents, though, thought they had some ability to communicate with her, and the only way to establish whether this was the case and whether she was capable of regaining consciousness was to conduct a PET scan. For a state court to starve someone to death who was not terminally ill, was not in pain, did not need extraordinary life-preserving measures, and might have been able to regain consciousness is frankly immoral. In our society, where convicted murderers frequently receive extensive due process—with courts examining and reexamining evidence to ensure that the defendant is truly guilty beyond a reasonable doubt—federal courts could have at the very least ordered a PET scan in Terri Schiavo's case.

Second, there was a real and contested disagreement between Michael Schiavo and Mrs. Schiavo's parents, Robert and Mary Schindler, over whether Terri Schiavo was responsive and over whether she would have wanted to die by starvation if she were ever in a vegetative state. The state courts early on appointed Michael Schiavo to be his wife's guardian, and they stuck by this appointment to the end, crediting his accounts of Mrs. Schiavo's wish to die by starvation over her parents' contrary wishes. This decision, too, seems to me to have been highly immoral. First, and to return to my initial point, absent a PET scan, I would not presume brain death and a loss of all consciousness in a person who was not terminally ill or in great pain, where the person's parents believe she was still mentally alive and interactive. Robert and Mary Schindler had known their daughter far longer than Michael had, and they felt that they had an ability to communicate with her. This feeling should have been honored and is another reason why the courts should have ordered a PET scan.

Moreover, I would not take the extraordinary step of assuming that a person wanted to have ordinary feeding and hydration discontinued, where the person's husband and parents disagree about what the person would have wanted and where no firm instructions from that person exist. Withdrawing treatment at the end of life is a decision that should be made only where the entire family of the person afflicted is in agreement on what the person affected would have wanted. That was not the case with Terri Schiavo. Instead, Mrs. Schiavo's feeding and hydration tube was withdrawn based on a casual conversation that Mrs. Schiavo had with her husband and that only Michael Schiavo could attest to. There were no written

instructions from Terri Schiavo directing that her feeding tube be withdrawn if she were to become mentally incapacitated. We do not allow oral instructions issued in casual conversation to govern the distribution of the property of the deceased, absent a written will. Why would we allow the same kind of casually issued instructions to be used as the basis for a decision to end someone's life?<sup>13</sup>

Third, Terri Schiavo's life was ended not by the denial of extraordinary care, such as artificial respiration or advanced chemotherapy, but by the denial of food and water. I have serious doubts about the morality of starving anyone to death—even a truly comatose person who can never recover and who indicated clearly that he or she *wanted* to be starved to death. Because starvation and dehydration must be painful ways in which to die, it seems to me morally wrong to starve to death even a family pet or a zoo animal. Respect for God's creation suggests that inflicting pain or denying relief in situations where one has a duty of care is morally wrong. I believe Michael Schiavo had an obligation to love his wife as Christ loved the Church. That he and we were obligated to go on feeding and hydrating Terri Schiavo under the circumstances of this case where her parents thought there was hope of her someday regaining consciousness seems to me self-evident. I have not decided whether I would say that the denial of food and water is always morally wrong, but it does seem self-evident that it was wrong based on the facts of Terri Schiavo's case. If Michael Schiavo felt burdened by caring for his wife, he always had available to him the option of divorce and of turning her care over to her parents. Divorcing her would have been morally wrong as well, but that moral wrong pales into insignificance when compared with what he and the courts actually did.

I am not of the view that all extraordinary medical care is morally obligatory, and where a person is terminally ill, in great pain, apparently unconscious, and has left instructions to be given pain-killing medication that could advance the date of death only by a few days, I would honor that person's request to receive the pain-killing medication. But Terri Schiavo's case is worlds removed from the hypothetical I just described. Courts that order starved to death a woman who has not had a PET scan, whose parents want to care for her, and whose close relatives believe might be able to regain consciousness in the future are courts that are behaving unreasonably. Admittedly, Mrs. Schiavo's autopsy found brain atrophy that was untreatable,<sup>14</sup> but these facts were not known beyond a reasonable doubt when her feeding and hydration were discontinued. It is not unreasonable for legions of ordinary citizens who were upset by the Terri Schiavo case to be outraged by the cavalier way in which the legal system handled her case.

Why are such moral arguments even relevant in a law review article? Many citizens, lawyers, and law professors apparently believe that the mo-

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<sup>13</sup> Wesley J. Smith, *The Legacy of Terry Schiavo*, WKLY. STANDARD, Apr. 11, 2005, at 11.

<sup>14</sup> Goodnough, *supra* note 12.

rality of Mrs. Schiavo's starvation is not an issue with which either the state or federal courts should be concerned. They argue that the state and federal courts in Mrs. Schiavo's case should only follow the law wherever the law leads. Judges are notoriously led astray when they follow their moral intuitions, rather than the rule of law, and this in fact has been the cause of much judicial activism. Many conservatives I know and respect were and are concerned that, in Terri Schiavo's case, Congress and the President were so concerned with the immorality of what was happening to Mrs. Schiavo that they lost sight of their greater obligation and of the judges' greater obligation to the rule of law.

I have some sympathy for this view. Before I found out what was actually happening in Schiavo's case, I, too, was concerned that the rule of law was being given short shrift in the various extraordinary efforts that were being made to save Mrs. Schiavo's life. Knowing what I know now, however, I think the rule of law concern fades in the face of the fact that both the Florida state courts and the federal courts had *equity jurisdiction* over Mrs. Schiavo's case. Equity jurisdiction exists to correct injustices that might occur because of the formalities and rigidities of the available remedies at law. Federal courts of equity in the United States have been highly solicitous over the last thirty-five years in issuing all sorts of last-minute stays and injunctions in capital punishment cases involving murderers convicted of heinous crimes. This is probably as it should be, since capital punishment is a grave and irreversible punishment that ought not to be imposed until every last legal question or appeal, no matter how frivolous, has been resolved.

Against this backdrop of the federal courts' behavior in capital punishment cases, the federal courts' complete equanimity—in the face of Mrs. Schiavo's death by starvation, without a PET scan, when her parents wanted to care for her—is appalling. Equity jurisdiction exists to be used to correct grave injustices, and in the Schiavo case, Congress seemed at the time to be preparing to pass some global legislation that would protect people's lives in end-of-life situations. Congress wanted to grant the equivalent of a temporary restraining order in the Schiavo case to keep Terri Schiavo alive until Congress could legislate more globally. For the federal courts to thumb their noses at Congress, given the equities of the Schiavo case and given the past behavior of the federal courts in countless capital punishment cases, is truly appalling. The moral issues *are* relevant to lawyers discussing the Schiavo case because the state and federal courts were sitting in equity and, in capital punishment equity cases, the courts have not hesitated to give great weight to the moral concern about prematurely ending life.<sup>15</sup> The contrast in the behavior of the federal courts in capital pun-

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<sup>15</sup> In part for this reason, Justices Brennan and Marshall took the position in *Furman v. Georgia* that the death penalty was always unconstitutional. 408 U.S. 238, 257 (1972) (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Justice Harry Blackmun later came to agree with Brennan and Mar-

ishment cases and in Terri Schiavo's case is dramatic and outrageous. If moral concerns apply in the one, as they do, they apply in the other. State and federal courts of equity failed miserably in Mrs. Schiavo's case in weighing the equities of ordering her death by starvation and dehydration.

### III. THE CONSTITUTIONALITY OF THE FEDERAL LAW CONGRESS PASSED AND PRESIDENT BUSH SIGNED FOR TERRI SCHIAVO'S RELIEF

When I first glanced at the federal law Congress and President Bush enacted to allow federal courts to take a second look at Mrs. Schiavo's case, I must admit I was quite skeptical of its constitutionality. For thirty-five years, judicial conservatives like myself have opposed broad federal court jurisdiction, favored broad *res judicata* effect for state court judgments in federal court, favored equitable doctrines of abstention, and opposed congressional power to reopen final judgments in federal question cases. "Terri's Law" flies in the face of all this, and so it came to me as no surprise that even a conservative, Republican-appointed judge like Judge Stanley F. Birch on the Eleventh Circuit would determine that the law was unconstitutional.<sup>16</sup> As I read about the legal issues raised by the law in more detail, however, and prepared to teach the Schiavo case to my federal jurisdiction students, I became increasingly skeptical of the arguments against Terri's Law. One by one, each doctrine that judicial conservatives invoked seemed to me to be more and more questionable as applied to Mrs. Schiavo's case. Although it is a very close question,<sup>17</sup> I finally concluded that Terri's Law was constitutional, although it is not one over which Tom DeLay should ever have threatened to impeach any judges.

#### A. Reopening a Final Judgment

The strongest argument against Terri's Law is that it unconstitutionally reopens a final state court judgment in a federal question case, thus violating *Plaut v. Spendthrift Farm, Inc.*<sup>18</sup> In *Plaut*, the United States Supreme Court firmly held that it was unconstitutional for Congress to pass a law that reopened a final judgment in a federal question case that *a federal court* had finally adjudicated. Terri's Law gave the federal District Court for the Middle District of Florida jurisdiction to rehear *de novo* any suit on behalf of Terri Schiavo "relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life" notwithstanding any

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shall, stating that he would not henceforth "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1993) (Blackmun, J., dissenting).

<sup>16</sup> *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring).

<sup>17</sup> In fact, Terri's Law is almost a perfect final exam hypothetical for a federal jurisdiction course because of the great difficulty and complexity of the issues it raises.

<sup>18</sup> 514 U.S. 211 (1995).

prior adjudication of such a claim in a state court proceeding.<sup>19</sup> The law expressly provided that the district court should entertain such a suit notwithstanding any abstention doctrine and regardless of whether remedies available in the state courts had been exhausted.

In his special concurrence to the Eleventh Circuit's denial of a request for rehearing en banc in the Schiavo case, Judge Birch argued that Terri's Law violated both separation of powers principles and *Plaut*.<sup>20</sup> Judge Birch concluded that Terri's Law was unconstitutional and that, therefore, the law's attempt to confer jurisdiction on the federal courts was in vain.<sup>21</sup> Judge Birch noted that Terri's Law (1) provided for de novo review of her claims, (2) provided for review of these claims with no res judicata effect for the prior state court judgments, (3) directed that the federal courts not abstain, and (4) provided that the case should be decided by the federal court without regard to whether any claims had been exhausted.<sup>22</sup> Judge Birch concluded that these four features of Terri's Law violated separation of powers by directing the federal courts on how to decide a case. Further, he repeatedly cited *Plaut* for the proposition that Congress cannot "direct[] what particular steps shall be taken in the progress of a judicial inquiry."<sup>23</sup> In Judge Birch's view, Terri's Law was exactly analogous to the congressional law invalidated in *Plaut* except that the law reopened a final *state court judgment* whereas the law in *Plaut* reopened a *federal court judgment*.

Assuming *Plaut* was rightly decided, which I believe it was, is there any reason why that case ought not to preclude the reopening of a final state court judgment? One difference between a final state court judgment in a federal question case and a final *federal* court judgment in such a case is that for 216 years, Congress has allowed the United States Supreme Court to review final state court judgments via its appellate jurisdiction. The Supreme Court, in hearing such appeals from a state's highest court, traditionally has had broad latitude to reconsider all aspects of the state court decision below. The rationale for such Supreme Court appellate review was explained in *Martin v. Hunter's Lessee*<sup>24</sup> and grows out of the fact that Article III gives the federal courts jurisdiction over all cases arising under federal law—regardless of which court first heard those cases. Under the reasoning of *Martin v. Hunter's Lessee*, it is absolutely crystal clear that Congress could, if it wanted to, make state federal question decisions in civil cases subject to appeal and de novo judicial review *in the lower fed-*

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<sup>19</sup> Act for the Relief of the Parents of Theresa Marie Schiavo ("Terri's Law"), Pub. L. No. 109-3, 119 Stat. 15 (2005).

<sup>20</sup> *Schiavo*, 404 F.3d at 1273–74 (Birch, J., concurring).

<sup>21</sup> *Id.* at 1276.

<sup>22</sup> *Id.* at 1273–74.

<sup>23</sup> *Plaut*, 514 U.S. at 225 (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 94–95 (1868)).

<sup>24</sup> 14 U.S. (1 Wheat.) 304 (1816).

*eral courts*. Indeed, Congress has by legislation provided for such de novo review of state court decisions in criminal cases through the habeas corpus jurisdiction.

If Congress could constitutionally provide that state court decisions in civil cases could be appealed to the local federal district court and from there up to the federal courts of appeals and the Supreme Court, it is hard to see why Congress could not pass Terri's Law which would have allowed for a new case to be brought challenging de novo the withdrawal of Mrs. Schiavo's feeding and hydration tube. A de novo civil case in federal court is essentially identical to a de novo habeas corpus case in the criminal law context. Both cases are new cases that allow the prior state court judgment to be essentially reviewed and attacked.

A Burkean tradition-minded constitutionalist might argue that we have had federal court habeas review of state court criminal law judgments since 1867, but we have had no comparable system of lower federal court collateral review of state court civil judgments. Absent such a tradition, a Burkean might conclude that Congress could not pass a law like Terri's Law. A textualist or an originalist on the other hand might argue that Terri's Law merely allows the lower federal courts to review state court civil judgments in the same way that the United States Supreme Court has always reviewed those judgments on appeal. Since there is absolutely nothing in the text of Article III which confines Congress to allowing only Supreme Court review of state court judgments, and not lower federal court review of them, I think Congress was clearly within its rights in passing Terri's Law and allowing de novo federal court review of Mrs. Schiavo's civil case.

The question is a hard one because Burkean and textualist/originalist arguments arguably point in opposing directions.<sup>25</sup> But where both houses of Congress and the President pass a law which is untraditional, but within the scope of the original meaning of the Constitution, I have elsewhere argued that the federal courts ought to uphold the law based on the Constitution's original meaning.<sup>26</sup> It is arguable, although not self-evident, that the federal courts should be reluctant all on their own to displace centuries of tradition because powerful reliance interests may grow up that the courts, acting on their own, ought to be hesitant to displace. But where the political branches of the federal government have determined that the reliance interests generated by tradition are outweighed by the harm that complying with tradition would lead to, the federal courts ought to defer to the political branches' assessment of the costs and benefits of following tradition, and they ought to decide the case based on the text and original meaning of the

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<sup>25</sup> See Steven G. Calabresi, *Text, Precedent, and Burke: Some Arguments from Practice Against a Strict Rule of Stare Decisis in Constitutional Cases*, 57 ALA. L. REV. (forthcoming 2006).

<sup>26</sup> *Id.*

Constitution.<sup>27</sup> In the Terri Schiavo case, the text of the Constitution plainly allows Congress to make state court civil judgments reviewable in the lower federal courts as well as in the United States Supreme Court. Since this is in effect what Congress has done, Terri's Law does not involve the reopening of a final state court judgment in a civil case and, thus, does not violate *Plaut v. Spendthrift Farm, Inc.*<sup>28</sup>

*B. Did Congress Impermissibly Provide a Rule for Decision of Terri Schiavo's Case?*

A second concern that is raised by Judge Birch's concurrence in the denial of rehearing en banc is whether Congress impermissibly established a rule for the decision of Terri Schiavo's case where it provided for de novo review, no abstention, and no exhaustion of state court remedies. *United States v. Klein*<sup>29</sup> established long ago that it is beyond Congress's constitutional power to direct the decision of a case or controversy if that case or controversy is properly before the federal courts.<sup>30</sup> Judge Birch evidently believed that Congress had put such a heavy thumb on one side of the scales that it had effectively directed a decision on behalf of Mrs. Schiavo's parents.

Judge Birch is certainly right that Congress may not direct the decision of a case or controversy by the independent, life-tenured federal courts. Had Congress done that with Terri's Law, there would indeed have been a core violation of the separation of powers. Determining whether Congress actually did direct the decision of Terri Schiavo's case depends, however, on whether it was impermissible for Congress to provide for: (1) de novo review, (2) no abstention by the federal courts, and (3) no requirement that the federal courts accord res judicata effect to the prior state court judgments in the Schiavo case or that there be exhaustion of state court remedies.

First, there is simply no question but that Congress can establish standards of review for cases in federal court and that Congress can provide for de novo review in particular. As Judge Gerald Tjoflat noted in his powerful dissent from the majority's denial of rehearing en banc of this case, "to hold that Congress may not establish nor alter standards of review would wreak havoc on dozens of federal statutes that do just that in numerous contexts."<sup>31</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Plaut*, 514 U.S. 211.

<sup>29</sup> 80 U.S. (13 Wall.) 128 (1871).

<sup>30</sup> For more on *United States v. Klein*, please see Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437 (2006).

<sup>31</sup> *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270,1281 n.5 (11th Cir. 2005) (Tjoflat, J., dissenting) (citing, for example, 5 U.S.C. § 552 (2000), which provides for de novo review of federal agency determinations of fees for requests of records of notice and comment proceedings).

Judge Tjoflat went on to observe that the federal habeas corpus statutes are a subset of this category of statutes and that “[s]ection 2254 review, in particular, prescribes not just any standard of review, but one regarding the degree of deference to be afforded final state adjudications.”<sup>32</sup> Thus, Judge Birch is wrong to imply that Congress is acting in an unusual way when it mandates de novo review in Terri Schiavo’s case. For 216 years, Congress has passed statutes setting standards of review.<sup>33</sup>

Second, Congress did not direct the decision of Mrs. Schiavo’s case impermissibly when it provided that abstention doctrines would not apply in any case brought on her behalf. The abstention doctrines are prudential exercises of the United States Supreme Court’s power as the highest court of equity in the land to limit the occasions on which federal courts of equity

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<sup>32</sup> *Id.* (citing 28 U.S.C. § 2254(d) (2000)).

<sup>33</sup> The following thirty-two federal statutes all provide for some kind of de novo review by the federal courts: 5 U.S.C. § 706 (2)(F) (review of government agency actions in employment actions in federal courts); 5 U.S.C. § 7703(c) (review of facts in appeal from agency decisions in federal circuit court for a government employee filing discrimination suit); 7 U.S.C. § 499g(c) (2000) (review of reparations order of Secretary of Agriculture, except that findings of fact of Secretary shall be prima facie evidence); 7 U.S.C. § 2023(a)(15) (district court review for businesses denied participation in the Food Stamp Program); 8 U.S.C. § 1421(c) (2000) (review in district court for person whose naturalization petition is denied); 8 U.S.C. § 1535(a)(3) (review of removal order of an alien by D.C. Circuit); 12 U.S.C. § 216b(e)(2) (2000) (review in federal court for certain actions involving national banks to determine legal ownership of unclaimed property); 12 U.S.C. § 1828(c)(7)(A) (review in antitrust actions arising out of merger transactions); 12 U.S.C. § 1849(b)(1) (de novo review in antitrust actions arising out of acquisition, merger, or consolidation transactions); 15 U.S.C. § 45(m)(2) (2000) (review of an agency finding of unfair or deceptive trade practices); 15 U.S.C. § 2620(b)(4)(B) (district court review of certain Environmental Protection Agency actions); 15 U.S.C. § 3414(b)(6)(F) (district court review of civil penalties assessed by Federal Energy Regulatory Commission); 16 U.S.C. § 823b(d)(3)(B) (2000) (review of Federal Energy Regulatory Commission actions to enforce a civil penalty); 16 U.S.C. § 3373(c) (review of assessments of a civil penalty); 18 U.S.C. § 923(f)(3) (2000) (federal court review of decisions of Secretary of the Treasury to deny application or revoke a license for dealing, manufacturing, or importing firearms); 21 U.S.C. § 335a(j)(2) (2000) (review of certain adverse decisions by Secretary of Agriculture by District Court for the District of Columbia or district court of residence); 21 U.S.C. § 844a(g) (review by district courts of orders of Attorney General); 22 U.S.C. § 4140(b)(2) (2000) (district court review of alleged violations of law, rule, regulation, or policy directive); 25 U.S.C. § 2103(d) (2000) (district court review of certain actions by the Department of the Interior); 26 U.S.C. § 6110(f)(4) (2000) (review in U.S. Tax Court or District Court for the District of Columbia of certain tax matters); 28 U.S.C. § 157(c)(1) (district court review of bankruptcy judge’s proposed findings and conclusions in related but noncore proceedings to a case under Title 11); 28 U.S.C. § 657(c) (provisions for trial de novo in district court of arbitration awards); 33 U.S.C. § 1320(f) (2000) (district court review of enforcement proceedings to abate pollution); 41 U.S.C. § 609(a)(3) (2000) (review in U.S. Court of Federal Claims or district court of decisions of contracting officers); 42 U.S.C. § 300e–9(d)(3) (2000) (district court review of decisions of Secretary of Health and Human Services assessing civil penalty); 42 U.S.C. § 1995 (right to de novo jury trial of certain criminal contempt proceedings); 42 U.S.C. § 2282a(c)(3)(B) (authority for district court to review de novo civil penalties assessed by Secretary of Energy under certain circumstances); 42 U.S.C. § 6303(d)(3)(B) (same); 42 U.S.C. § 8433(d)(3)(B) (same); 47 U.S.C. § 504(a) (2000) (district court review of certain forfeitures); 50 U.S.C. app. § 2158(m) (2000) (de novo review in District Court for the District of Columbia of withholding by federal officials or agencies of certain transcripts, records, and similar items from complainant); 50 U.S.C. app. § 2410(f) (de novo review of civil actions for federal government’s recovery of penalties).

will interfere with state court processes. These doctrines represent an equitable weighing by the Supreme Court of the constitutional values of federalism against the command of the relevant jurisdictional statutes. If Congress, the chief federal policymaking body, concludes that the equities in cases like Mrs. Schiavo's case call for a more specific jurisdictional statute which gives less weight to federalism concerns and more weight to claims of individual rights, then this is something for which Congress ought to be able to provide. The weighing of equities is an inherently policymaking enterprise, which is why it makes sense to conclude that the abstention doctrines are prudential, and hence overridable by Congress, rather than being constitutionally based and off-limits to normal congressional intervention.

The particular abstention doctrine applicable in Mrs. Schiavo's case, as Judge Tjoflat's dissent makes clear, is the so-called *Rooker-Feldman* doctrine which basically says that a party cannot "appeal" an unfavorable state court decision by taking the exact same case to the lower federal courts. The *Rooker-Feldman* doctrine, however, has always had an exception when a federal statute authorizes federal appellate review of final state court decisions. As Judge Tjoflat explained, "That is because *Rooker* did not establish a constitutional (or even prudential) bar to federal review of final state court decisions; instead it recognized a statutory bar to such review."<sup>34</sup>

Third, and finally, Congress did not impermissibly direct the decision of Mrs. Schiavo's case when it freed the federal courts from being bound to follow the state courts' decisions regarding Schiavo under the doctrines of issue or claim preclusion. As Judge Tjoflat noted, Congress has no constitutional obligation at all to even let the Florida state courts have concurrent jurisdiction over Mrs. Schiavo's claims.<sup>35</sup> Since Congress need not even allow the Florida state courts to hear Mrs. Schiavo's federal claims, Congress can certainly take the lesser step of allowing the state courts to hear those

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<sup>34</sup> *Schiavo*, 404 F.3d at 1282 n.7 (Tjoflat, J., dissenting) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) ("Under the *legislation* of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original." (emphasis added))); *cf.* *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) ("The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, *see* § 1257(a). The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency."). Judge Tjoflat then concludes by saying that

it was completely within Congress's power to make an exception to the general rule regarding the power of the district courts to review final state court decisions, and it is clear from the face of the statute that Congress intended to do so. Judge Birch does not explain why, under these circumstances, it is of any moment whether Congress provided such an exception in the body of the Americans with Disabilities Act or the Rehabilitation Act of 1973.

*Schiavo*, 404 F.3d at 1282 n.7 (Tjoflat, J., dissenting).

<sup>35</sup> *Id.* at 1280–81.

claims but permit de novo review of the claims in federal court without there being any issue or claim preclusion. Such preclusion exists because Congress has provided for it by statute in the Full Faith and Credit Act since the beginning of our history.<sup>36</sup>

If Congress wants to amend its statutes to allow for de novo federal court review of a federal claim, which it could have kept out of state court altogether, it can certainly take this lesser step under a greater-includes-the-lesser theory. Moreover, Congress also was within its rights to free Mrs. Schiavo's parents of any obligation to exhaust their remedies in state court. As Judge Tjoflat noted in his dissent, "Congress's authority over exhaustion requirements was recognized in *Patsy v. Board of Regents of Florida*"<sup>37</sup> where the Court held that "[p]olicy considerations alone cannot justify *judicially imposed* exhaustion unless exhaustion is consistent with congressional intent."<sup>38</sup>

*C. Was Congress's Action in Passing Terri's Law Beyond the Scope of Its Enumerated Powers to Enforce the Fourteenth Amendment Under Section Five?*

The final major constitutional issue raised by Terri's Law is whether Congress exceeded the scope of its enumerated powers when it legislated to give Terri Schiavo's parents their day in federal court. A fundamental principle of the law of federal jurisdiction is that Congress cannot extend federal question jurisdiction simply by passing a federal jurisdictional statute.<sup>39</sup> If all Congress had to do to extend federal question jurisdiction were to pass a jurisdictional statute, there would be nothing to prevent Congress from bringing into federal courts all cases involving issues of purely state law.

In Mrs. Schiavo's case, a state court judge—who was by definition a state actor—had ordered the withdrawal of all feeding and hydration because he thought Michael Schiavo had shown by "clear and convincing evidence" that this was what his wife would have wanted had she known she was going to end up in a persistent vegetative state. Terri Schiavo's right to procedural due process was violated by the state judge's order because the judge was wrong to apply a clear and convincing evidence standard instead

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<sup>36</sup> The Full Faith and Credit Act is not to be confused with the Full Faith and Credit Clause. The Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." *Id.* The Full Faith and Credit Act, 28 U.S.C. § 1738, provides for a means of authenticating a state judicial proceeding through presentation of copies of official records of judgment, and is thus the codification by which Congress "[prescribes] by general Laws the manner in which" the acts referred to in the Full Faith and Credit Clause are proven, and their effect. *Id.*

<sup>37</sup> 457 U.S. 496 (1982).

<sup>38</sup> *Schiavo*, 404 F.3d at 1282 n.8 (Tjoflat, J., dissenting) (quoting *Patsy*, 457 U.S. at 513).

<sup>39</sup> *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

of a beyond a reasonable doubt standard. The clear and convincing evidence standard appears in Mrs. Schiavo's case in part because it is mentioned in *Cruzan v. Director, Missouri Department of Health*,<sup>40</sup> where the Court assumes that the United States Constitution "would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."<sup>41</sup> The *Cruzan* Court then notes that where a person is incompetent himself to exercise that right, the state of Missouri provides by statute: "[E]vidence of the incompetent's wishes as to withdrawal of treatment [must] be proved by clear and convincing evidence. The question then is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not."<sup>42</sup>

*Cruzan's* holding that Missouri was within its rights to require clear and convincing evidence before an incompetent's hydration and nutrition is withdrawn, in a case where clear and convincing evidence of a desire to die was not found, does not establish that the clear and convincing evidence standard is the right standard to use in these sorts of cases. We are dealing here with court orders that many Americans believe involve the ending of life. Ordinarily, in end-of-life cases such as those involving heinous murderers convicted of heinous crimes, we demand proof beyond a reasonable doubt before life may be ended, and in capital cases there are additional procedural protections against the conviction of the innocent beyond even those present in ordinary criminal cases.<sup>43</sup> The Supreme Court's extensive capital punishment case law thus suggests that before the life of even a heinous murderer may be taken, there must be proof of guilt well beyond a reasonable doubt. In noncapital criminal cases, where the defendant may be deprived only of liberty or property, but not of life (unlike Terri Schiavo), the Supreme Court has again held that there must be proof beyond a reasonable doubt.<sup>44</sup> No one would think of depriving a criminal defendant of liberty or property where there was only clear and convincing evidence of

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<sup>40</sup> 497 U.S. 261 (1990).

<sup>41</sup> *Id.* at 279.

<sup>42</sup> *Id.* at 280.

<sup>43</sup> For an example of these procedural protections, see *People v. Gacy*, 530 N.E.2d 1340 (Ill. 1988), *cert. denied*, 490 U.S. 1085 (1989), *habeas corpus denied sub nom. U.S. ex rel Gacy v. Welborn*, No. 89-C-6392, 1992 U.S. Dist. LEXIS 12498 (N.D. Ill. Aug. 18, 1992), *motion denied*, No. 89-C-6392, 1992 U.S. Dist. LEXIS 18073 (N.D. Ill. Nov. 23, 1992), *aff'd*, *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993), *reh'g en banc denied*, No. 92-3448, 1993 U.S. App. LEXIS 10460 (7th Cir. May 7, 1993), *stay denied*, *application denied*, *Gacy v. Page*, 24 F.3d 887 (7th Cir. 1994). *See also* Federal Death Penalty Act, 18 U.S.C. § 3591 (2000).

<sup>44</sup> *Fiore v. White*, 531 U.S. 225, 228–29 (2001) ("This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge [of operating a hazardous waste facility without a permit] violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. In this case, failure to possess a permit is a basic element of the crime of which Fiore was convicted. And the parties agree that the Commonwealth presented no evidence whatsoever to prove that basic element." (citations omitted)).

guilt rather than proof beyond a reasonable doubt. It logically follows then that we should require the same in other end-of-life cases.

In *In re Winship*,<sup>45</sup> decided in 1970, the Supreme Court squarely faced the question of what standard of proof is required for juveniles accused of a crime in a juvenile delinquency proceeding. The Supreme Court was unequivocal in its answer: Juveniles may only be deprived of liberty or property where they have been proven guilty “beyond a reasonable doubt.”<sup>46</sup> Justice Brennan, in his opinion for the Court, first noted that

[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The “demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula ‘beyond a reasonable doubt’ seems to have occurred as late as 1798.”<sup>47</sup>

Justice Brennan went on to explain that

[t]he requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal trial has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.<sup>48</sup>

The lower clear and convincing standard is used to set the standard of neglect that a state must prove before it may terminate parental rights,<sup>49</sup> and it is also the standard used for civil commitment proceedings.<sup>50</sup> For all criminal trials resulting in a deprivation of liberty or property, however, proof must be shown by more than clear and convincing evidence: It must be shown beyond a reasonable doubt.

Generally, in trying to determine what level of procedural due process the Fourteenth Amendment requires before a state may deprive someone of life, liberty, or property, one would look to our history and practices. As Justice Curtis famously said in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,<sup>51</sup> “we must look to those settled usages and modes of proceeding existing in the common law and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after

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<sup>45</sup> 397 U.S. 358 (1970).

<sup>46</sup> *Id.* at 368.

<sup>47</sup> *Id.* at 361.

<sup>48</sup> *Id.* at 363–64.

<sup>49</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>50</sup> *Addington v. Texas*, 441 U.S. 418 (1979).

<sup>51</sup> 59 U.S. (18 How.) 272 (1856).

the settlement of this country.”<sup>52</sup> The difficulty in a case like Terri Schiavo’s is that only quite recently have patients like her been able to stay alive, and so it is only recently that we have had to struggle with the question of how clearly a patient must express their wish not to be fed or hydrated if they should lapse into a persistent vegetative state. In short, history and practice cannot answer the question of whether Terri Schiavo has been deprived of procedural due process because the whole question of what to do with patients like her is of entirely modern origin.

In this situation, it is the responsibility of the Supreme Court to analogize to other related areas of law to determine what level of procedural due process is appropriate before we determine that someone who is in a persistent vegetative state and who has not had a PET scan would want to be deprived of food and water. It seems to me that the appropriate level of procedural due process in a case like Terri Schiavo’s is at least as high as it is in a case where criminals are deprived of liberty or property through a criminal conviction. Surely it is as serious a matter to deprive a voiceless person of life by starvation or dehydration as it is to deprive a criminal defendant of liberty or property. This is especially the case here where no PET scan had been done to prove permanent loss of higher mental faculties and where the proposed method of death is dehydration and starvation. For over thirty years, the capital punishment jurisprudence in this country has made a fetish out of ensuring that no accused criminal be put to death without employing the highest level of procedural due process, including not only proof beyond a reasonable doubt in one’s primary trial and appeals but also two additional trips through the state and federal courts on state and federal habeas corpus petitions, respectively. If we require that much procedural due process before taking the life of a murderer in a capital case, surely we should require Terri Schiavo’s husband to prove that his wife would have wanted to be starved and dehydrated to death *beyond a reasonable doubt*.

In Mrs. Schiavo’s case, the Florida state courts, the federal district court, and the Eleventh Circuit all proceeded on the *Cruzan*-generated assumption that the level of procedural due process she was entitled to was clear and convincing evidence that she would have wanted to be starved and dehydrated. I think that was too lax a burden of proof for Michael Schiavo to have to meet. Given what was at stake, Michael Schiavo should have been required to prove beyond a reasonable doubt that his wife’s wish was to die. Since the Florida state court order was going to deprive Terri Schiavo of life without due process of law, the Fourteenth Amendment was violated; Congress had the power under Section 5 of the amendment to legislate to protect Mrs. Schiavo’s right not to be deprived of life unless it was proven that this was her wish beyond a reasonable doubt. Accordingly, Congress did have power under the Constitution to enact Terri’s Law.

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<sup>52</sup> *Id.* at 277.

IV. WAS IT GOOD POLICY FOR CONGRESS TO LEGISLATE SPECIALLY  
IN TERRI SCHIAVO'S CASE?

Even if Terri's Law is conceded to be constitutional, the question still arises as to whether it is a good idea as a matter of policy for Congress to legislate in the case of a specific named individual in the way it did here. Under our Constitution, it is usually the case that the legislature enacts general laws that apply to many individuals, and only the executive and judicial branches apply those general laws to specific individual cases. Indeed, the Constitution expressly forbids Congress from legislating to impose *burdens* on specific named individuals through the Bill of Attainder Clause.<sup>53</sup> Here, since Congress was conferring a *benefit* on Mrs. Schiavo, the Bill of Attainder Clause is not implicated, but one could argue, as many did, that it is an inappropriate use of Congress's time and energy for it to pass laws applying to specific named persons like Terri Schiavo. Many citizens I know thought Congress's action was unseemly as well.

The first policy argument in defense of Terri's Law is that it addresses the coarsening of moral values and the embracing of a culture of death in contemporary America. The easy availability of even late-stage abortions, the cavalier attitude with which many approach stem cell research, the breakdown of heterosexual marriage as an institution, and many other related social ills all suggest that, as the late Pope John Paul II said, we are facing a struggle between a culture of life and a culture of death.<sup>54</sup> Trying to save Terri Schiavo's life was a way for Congress to express itself on a culture of life issue. It was a way to dramatize, to a late Roman Empire-esque culture, that every individual human life matters—and matters a lot. What Congress did in the Schiavo case dominated the news for a period of weeks, and there is evidence that Congress's bravery was not entirely popular. By taking a stand in the Schiavo case, Congress weighed in on the culture war raging in this country. I believe that was a very good use of Congress's time and energy. None of those who complained about Terri's Law, I suspect, would have complained if Congress had acted to save the life of a single named convicted murderer on death row. This shows that the real opposition to Terri's Law is generated not by the fact it was enacted for her special benefit, but by the ideological opposition of culture-of-death forces.

A second policy argument in defense of Terri's Law is that it was necessary to save Mrs. Schiavo's life at least for as long as Congress deliberated over what sort of general end-of-life legislation it might want to enact. Congress indicated in the final section of Terri's Law that "[i]t is the Sense of the Congress that the 109th Congress should consider policies regarding the status and legal rights of incapacitated individuals who are incapable of

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<sup>53</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>54</sup> Pope John Paul II, *Evangelium vitae on the Value and Inviolability of Human Life*, VATICAN.VA, March 25, 1995, at § 21, [http://www.scborromeo.org/docs/evang\\_vitae.pdf](http://www.scborromeo.org/docs/evang_vitae.pdf).

making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care.”<sup>55</sup> The fact of the matter is that the passage of any new laws in this area would take months, if not years. Accordingly, for Mrs. Schiavo to benefit from any new laws Congress might eventually enact, it was necessary that Congress pass Terri’s Law as a kind of temporary restraining order to keep Mrs. Schiavo alive until she could benefit from some new, global legislation. I see absolutely no reason why Congress should hesitate to preserve the status quo from some irreparable injury when it is seriously thinking of passing new global legislation. That is all Congress was doing here.

Finally, a third policy argument in favor of Terri’s Law is that ever since the *Cruzan* case and continuing on through *Washington v. Glucksberg*,<sup>56</sup> this area of end-of-life decisionmaking has been monopolized by judges and the courts. I firmly believe that this state of affairs is unhealthy in a democracy and that it is affirmatively good for the people’s elected representatives to tell the judges what they think about these issues for once, instead of the conversation proceeding the other way around. We fought two World Wars and a Cold War in the last century to preserve democracy, and it is high time for Congress to remind our judges, both federal and state, that we are in fact a democracy. I am thus in favor of Congress overruling the courts on occasion just as a matter of principle. It is affirmatively good for the people to remind judges that they work for us.

#### V. CONCLUSION

In conclusion, contrary to what the media has largely reported about Terri’s Law, moral and equitable arguments weighed in favor of Congress’s decision to intervene to try to save Terri Schiavo’s life. The law that Congress enacted did not violate the Constitution by reopening a final judgment, by attempting impermissibly to direct a judicial decision, or by exceeding Congress’s enumerated power. Terri’s Law was also fully justified as a matter of policy because it reaffirmed Congress’s commitment to a culture of life, because it would have acted to prevent an irreparable injury before more global legislation could be enacted, and because it is a good idea for Congress to sometimes tell the courts what to do. It is extremely sad, in light of all of this, that the federal district court, the Eleventh Circuit, Circuit Justice Anthony M. Kennedy, and the United States Supreme Court all allowed Terri Schiavo to be starved and dehydrated to death notwithstanding Congress’s best efforts to keep her alive. We can only hope that some new, global federal legislation to protect patients in end-of-life situa-

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<sup>55</sup> Act for the Relief of the Parents of Theresa Marie Schiavo (“Terri’s Law”), Pub. L. No. 109-3 § 9, 119 Stat. 15 (2005).

<sup>56</sup> 521 U.S. 702 (1997) (reversing the Ninth Circuit’s decision that Washington’s suicide prohibition against “aid[ing]” or “caus[ing]” a suicide was a violation of the Due Process Clause of the Constitution).

tions will come out of all of this. It is high time we afforded the same protections to patients like Terri Schiavo that we afford to convicted murderers on death row.